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**IN THE  
COURT OF APPEALS OF INDIANA**

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WILLIE E. HARRIS,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 45A05-0004-PC-173

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Kathleen A. Sullivan, Magistrate  
Cause No. 45G04-9302-CF-00025

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**April 25, 2001**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Willie E. Harris, appeals the denial of his post-conviction relief petition. Specifically, Harris contends that the State suppressed exculpatory evidence thereby committing a *Brady* violation. Harris further argues that he received ineffective assistance from his trial counsel because his counsel did not attempt to obtain the exculpatory evidence before trial. We find that because Harris could have discovered the suppressed evidence with reasonable diligence, there was no Brady violation. We further find that Harris did not receive ineffective assistance from his trial counsel. Therefore, we affirm the denial of post-conviction relief.<sup>1</sup>

## **Facts and Procedural History**

The record reveals that on February 4, 1993, Willie Harris and his wife, Anna, went to help a friend, Essie Johnson, move out of her home. They could not find Johnson's home so they stopped at a pay phone outside of a bar to call for directions. While Harris was on the phone, Leslie Jones came out of the bar, called out to Harris in a hostile manner, and intentionally bumped into him. Harris and Anna then walked away from Jones and down the street to Johnson's house where Jones also lived.

While Harris and Anna were at Johnson's house, Jones again made hostile comments and began harassing Harris. When Harris and Anna tried to leave, their car would not start. Anna called her sister who came and attempted to jumpstart the car. As

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<sup>1</sup> We would like to thank the Valparaiso University School of Law Student Bar Association and Phi Delta Phi for inviting us to hold an oral argument at their law school. We would also like to thank the attorneys, Chris Hitz-Bradley and Janet Parsanko for traveling to Valparaiso from Indianapolis for this argument and for being fully prepared to give an oral argument on short notice.

Harris was connecting the jumper cables, Jones snatched them out of his hand and refused to return them. Harris shoved Jones, pulled out a handgun and shot Jones once in the head. Jones died a few minutes later with jumper cables in his left hand and a gun in his pants pocket. The gun had six live rounds in it.

The Lake County Coroner's Office performed an autopsy; and blood, bile and urine samples were sent to the State Department of Toxicology for analysis. The toxicology report showed that Jones' blood alcohol level was .19% and that he had cocaine in his system. During the post-conviction hearing, Dr. David Ackley, a toxicologist, testified as to the effects alcohol and cocaine might have on a person. He testified that alcohol is a depressant and can cause a person to have changes in self-judgment, dulled vision and hearing, loss of muscle control causing swaying and jerky movements, and altered spatial perceptions. Dr. Ackley stated that cocaine causes "hyperactivity, a burst of energy," in a person. When asked about Jones specifically, Dr. Ackley stated that "all I can really tell you is that his mood was altered from what normally would be, but I can't tell you how he was behaving." PCR at 249.

The toxicology report was sent back to the Coroner's office, but never forwarded to the prosecution nor disclosed to the defense. At the post-conviction hearing, Harris' trial counsel testified that he was aware of Jones' alcohol use at the time of his death, but that he never attempted to obtain the toxicology report. He called not requesting this report an "oversight on my part . . . ." PCR at 143.

During the trial, the defense attempted to cross-examine Dr. Young Kim, the pathologist who performed the autopsy on Jones, regarding Jones' alcohol use. The trial

court did not allow the defense attorney to pursue this line of questioning, ruling that there was no indication by anyone that the victim had been drinking or appeared to be intoxicated. Dr. Kim was allowed to testify as to his finding in the autopsy report that there was not an odor of alcohol emanating from the victim.

A jury convicted Harris of murder and he was sentenced to forty years in prison. This court upheld his conviction on appeal. *Harris v. State*, No. 45A03-9312-CR-423, (Ind. Ct. App. 1994)(unpublished memorandum decision), *trans. denied*. Harris filed a *pro se* petition for post-conviction relief which he amended, by counsel, on July 14, 1999, and January 20, 2000. After a hearing on March 27, 2000, his petition for post-conviction relief was denied. Harris then initiated this appeal.

### **Discussion and Decision**

On appeal from the denial of a petition for post-conviction relief, we neither reweigh the evidence nor judge the credibility of witnesses. *Capps v. State*, 709 N.E.2d 24, 25 (Ind. Ct. App. 1999), *trans. denied*. To prevail on appeal from the denial of his petition, the petitioner must show that the evidence is without conflict and leads only to a conclusion opposite that reached by the post-conviction court. *Id.* It is only where the evidence is without conflict and leads to but one conclusion, and the trial court has reached the opposite conclusion, that the decision will be disturbed as being contrary to law. *Id.*

Harris contends that the toxicology report completed on the victim, Jones, was not disclosed to him by the prosecution in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) *reh'g. denied*. Harris also alleges that he received

ineffective assistance from his trial counsel for failing to collect all of the evidence relevant to Harris' defense in preparation for trial. Specifically, Harris alleges that the omission of the toxicology report prejudiced his defense.

### *I. Brady Violation*

The Supreme Court held in *Brady* that due process is violated when the prosecution withholds evidence favorable to the accused that is material either to guilt or to punishment. 373 U.S. at 87. To reverse, a defendant must establish: (1) that the prosecutor suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the suppressed evidence was material. *Azania v. State*, 730 N.E.2d 646, 655 (Ind. 2000) (citing *Brady v. Maryland*, 373 U.S. at 87). We must examine the toxicology report in light of these three requirements.

Harris contends that the prosecutor had a duty to disclose the toxicology report to the defense even though the report was not part of the prosecutor's file. He states that the prosecution has a duty to learn of all relevant evidence known to other agencies acting on behalf of the government. Harris argues to fulfill this duty the prosecutor is required to put in place procedures which will ensure that the prosecutor is advised of this evidence. In this case, because the Coroner's Office and Department of Toxicology were working for the State, Harris alleges that the prosecution should have received the report before trial. Since it is uncontroverted that the defendant did not receive the toxicology report, Harris contends that the prosecution suppressed evidence in violation of *Brady*. We disagree.

We note that Harris concedes the State did not have the toxicology report in its file at the time of trial. Further, the State agrees that a prosecutor has a duty to learn of any favorable evidence known by others acting on behalf of the State. *Turner v. State*, 684 N.E.2d 564, 568 (Ind. Ct. App. 1997), *trans. denied*; *see also Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995). However, there is no *Brady* violation if the evidence was available to the defendant through the exercise of reasonable diligence. *Turner*, 684 N.E.2d at 568 (citing *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996)); *see also State v. Nikolaenko*, 687 N.E.2d 581, 584 (Ind. Ct. App. 1997), *Conner v. State*, 711 N.E.2d 1238, 1246 (Ind. 1999), *cert. denied*, \_\_ U.S. \_\_, 121 S.Ct. 81, 148 L.Ed.2d. 43 (2000). In *Turner*, the defendant claimed the state suppressed evidence in violation of *Brady* because the defendant was not informed of the results of his blood alcohol test. The prosecution was unaware of the existence of the defendant's blood alcohol test results, but a Lieutenant in the police department knew of their existence. *Turner*, 684 N.E.2d at 568. On appeal, we held because the defendant had a police log concerning the case which described a "blood test call" and the name of the police officer who took the defendant to the hospital for the blood alcohol test, the blood alcohol test results were available to the defendant through the exercise of due diligence. *Id.* Because the defendant through due diligence could have received the results, we found that the state did not suppress the blood alcohol tests and therefore, there was no *Brady* violation. *Id.*

Similarly, Harris knew that the toxicology report existed before the trial began. Harris' trial counsel, Alexander Woloshansky, testified at the post-conviction relief

hearing that he knew that a toxicological analysis was performed on the victim because the autopsy report disclosed that blood and urine samples had been taken. Woloshansky also testified that in previous cases he has asked prosecutors to expedite toxicology results and that it was an oversight on his part to not make additional requests for the report. Based on this evidence, the defense could have received the results of the toxicology report on its own with the exercise of reasonable diligence. Accordingly, the prosecution did not suppress the results of the toxicology report and we find no *Brady* violation.

## *II. Ineffective Assistance of Counsel*

Initially, we note that a claim of ineffective assistance of trial counsel is no longer waived if not raised on direct appeal. *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999). Instead, ineffective assistance of trial counsel may be presented for the first time in post-conviction proceedings. *Id.*

We analyze ineffective assistance of counsel claims under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000). To succeed, the petitioner must demonstrate both deficient performance and resulting prejudice. *Ben-Yisrayl*, 729 N.E.2d at 106. A deficient performance is that which falls below an objective standard of reasonableness. *Id.* Prejudice exists when “there is a reasonable probability that the result of the proceeding would have been different but for defense counsel’s inadequate representation.” *Id.* (citing *Cook v. State*, 675 N.E.2d 687, 692 (Ind. 1996)). Additionally, to establish prejudice, the defendant must show that counsel’s errors so

undermined the proper functioning of the adversarial system that the trial cannot be relied on as having produced a just and reliable result. *Smith v. State*, 689 N.E. 2d 1238, 1244 (Ind. 1997). We prefer to address the prejudice element first since the object of an ineffectiveness claim is not to grade counsel's performance, and it is often easier to dispose of the issue on the prejudice prong. *Games v. State*, 684 N.E.2d 466, 468 (Ind. 1997), *opinion modified on other grounds*, 690 N.E.2d 211 (Ind. 1997).

To determine whether Harris was prejudiced because counsel failed to obtain the toxicology report, we must first examine Harris' defense. Harris claims that he was defending himself from Jones when he shot Jones in the head. A person is justified in using reasonable force against another person to protect himself from what he reasonably believes to be the imminent use of unlawful force. Ind.Code § 35-41-3-2(a). However, a person is justified in using deadly force only if he reasonably believes that the force is necessary to prevent serious bodily injury. I.C. § 35-41-3-2(a). To establish a self-defense claim, a defendant must demonstrate that he was in a place where he had the right to be, acted without fault, and was in reasonable fear or apprehension of death or great bodily harm. *Miller v. State*, 720 N.E.2d 696, 699-70 (Ind. 1999). Once a defendant claims self-defense, the State bears the burden of disproving at least one of these elements beyond a reasonable doubt for the defendant's claim to fail. *Id.*

When self-defense is at issue, the trier of fact must determine whether a reasonable person in the same circumstance would have been placed in reasonable fear or apprehension of death or great bodily harm. The jury must look at the issue of self-defense from the defendant's viewpoint and the appraisal of fear and danger that he had



at the time of the encounter. *Shepard v. State*, 451 N.E. 2d 1118 (Ind. Ct. App. 1983), *reh'g denied*.

The crux of Harris' defense was that Jones acted in a manner which caused Harris to fear for his life. Particularly, Harris alleged Jones was acting in a hostile, threatening and aggressive manner toward him which ended with Jones pulling out his gun. Harris then claims he shot Jones in the head to defend himself from being shot by Jones.

Undoubtedly, Jones' behavior was critical to Harris' defense. Jones' aggressive behavior against Harris was a relevant factor that the jury could have considered in determining whether Harris was in reasonable fear. Had the jurors known of Jones' blood alcohol level and his use of cocaine, they may have credited Harris' claim of Jones' hostile and erratic behavior.

But, aggression on the part of Jones was not enough to show Harris acted in self-defense. In order for Harris to act in self-defense, Harris must have been in reasonable fear or apprehension *of death or great bodily harm*. *Miller*, 720 N.E.2d at 699-70 (emphasis added). Harris testified that he was in reasonable fear of death because Jones pulled a gun out of his coat pocket and aimed it at him. The only other witness who testified that Jones pulled out a gun was Harris' wife, Anna. Both stated that after Jones grabbed the jumper cables from Harris, and Harris shoved him, Jones pulled a gun out of his coat pocket. However, Anna told the police immediately after the shooting that she never saw Jones with a gun, nor did she know he had one until after he was killed.

The evidence further showed that Jones, at the time of his death, wore a long coat that stretched almost to his knees. After the shooting, Jones' gun was found in his right

pants pocket located underneath his coat. Also, Jones was still holding the jumper cables in his left hand at the time of his death.

Given the considerable evidence indicating that Jones did not draw his gun on Harris, we find his attorney's failure to obtain the toxicology results did not prejudice Harris. Had the toxicology results been admitted, the results of the trial would not have changed. We are confident that the jury's verdict is fair and reliable.

Harris has not shown that the evidence is without conflict and leads only to a conclusion opposite that reached by the post-conviction court. Thus, we affirm the denial of post-conviction relief.

BAILEY, J., concurs.

BARNES, J., dissents with separate opinion.

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Appellant-Petitioner,	)	
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STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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**BARNES, Judge, dissenting**

I respectfully dissent. I agree with the majority that no Brady violation occurred because defense counsel was aware that the blood and toxicological tests were requested by the State. The State provided discovery material which contained that information, and due diligence by defense counsel would and should have revealed the fact that the decedent had a blood alcohol level of .19% and cocaine in his system.

I disagree with the majority because it is my opinion that defense counsel's failure to secure the results of those tests resulted in Harris receiving ineffective assistance of counsel, and thus a new proceeding in this matter is warranted.

I am cognizant of and sympathetic to the pressures and demand on attorneys who

represent indigent criminal defendants and reluctantly come to this conclusion. However, Harris was convicted of murder and is serving a forty-year term. During the trial, the jury did not know the decedent had a blood alcohol level of .19% and cocaine in his system. Evidence of the potential effects of alcohol and cocaine were understandably prohibited by the trial judge because there was no such evidence to place before the factfinder. There was no such evidence because defense counsel committed what he called, an "oversight on my part.... ." Harris plead self-defense and although his wife apparently gave conflicting statements and testimony concerning the actions of the decedent, it is uncontroverted that no mention was made of the alcohol or cocaine in the blood of decedent. While the majority posits that "had the toxicology results been admitted, the results of the trial would not have changed," and logically mentions that it appears as if decedent never brandished the weapon that was found on his person, thus casting considerable doubt on the rendition of facts Harris gave at the trial, I am not convinced that had the jury known of the cocaine and blood alcohol level, particularly in the factual context of this case, that the result would have been the same, i.e., a conviction of murder.

I acknowledge the two-pronged test for ineffective assistance of counsel as articulated by Strickland and Ben-Yisrayl. I am of the opinion that had the jury been advised of the cocaine and blood level, there is a "reasonable probability" that their collective perception regarding Harris' conduct would have changed. Harris is not guaranteed a more favorable outcome here, but merits the opportunity to have this matter disposed of with a full exposition of the facts available to those who will decide his fate.

